LETTER

TO

EARL FITZWILLIAM,

UPON THE POWER OF

COMPELLING THE ASSESSMENT

OF A

Church Rate,

BY PROCEEDINGS IN COURTS OF LAW.

BY

JAMES MANNING,

OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.

Third Edition, enlarged,

WITH A POSTSCRIPT ON ECCLESIASTICAL CENSURES.

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ADVERTISEMENT

TO

THIRD EDITION.

ADDITIONAL matter has been introduced into the Letter in this Edition, and a Postscript has been written, for the purpose of shewing more fully the incompetency of the Spiritual Court to compel the making of a Church Rate by ecclesiastical censures.

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TO

SECOND EDITION.

In order that this Letter might be published before the late Discussion in the House of Commons, the materials were hastily collected and put together. Several omissions are now supplied; and it will be seen that the writer has availed himself of the opportunity now afforded him of adverting to a Pamphlet from the pen of Dr. Nicholl, the Member for Cardiff.

A Table of Cases and Authorities is subjoined. Those printed in *italics* have been already cited or noticed by the advocates for the perpetuity of Church Rates.

(*a*) That this work does not deserve the obloquy to which it has been subjected, see Reeves's History of the Law, vol. iv. page 117.

LETTER

TO

EARL FITZWILLIAM.

Temple, 22 May, 1837.

My Lord,

I have long entertained the opinion (singular and erroneous as it may at present appear) that those venerable fabrics which the piety of our ancestors raised for the worship of the one living and true God, are to be considered, in right, either as appropriated to that *single* mode of worship which the founders, whether Catholic or Protestant, deemed to be alone acceptable to that Being to whose honour they were erected, or as dedicated to the general service of religion according to *every* form of devotion which may from time to time be adopted in the districts for the spiritual benefit of the successive inhabitants of which these structures were erected. The bill now before the House of Commons adopts neither of these views; but appears to recognize an exclusive title to those sacred edifices, and a peculiar interest in the sublime and solemn feelings which they inspire, as the especial privilege of one class of His Majesty's subjects, who, however intelligent, numerous, and opulent, neither represent the religious sentiments of the whole community, nor can advance claims to any considerable extent on the ground of foundership. Not being able to perceive the justice of refusing to the *whole* religion (*a*)

(*a*) This is not the place for considering the difficulties which may be supposed to attend the use of the same building by different classes of religionists, or the mode in which these difficulties have in other countries been overcome. In Germany and in Switzerland the alternate use of the same church has been long known. In Paris, a temple erected for the Pères de l'Oratoire has on the same day witnessed the devotions of English Episcopalians, Swiss Réformés (Presbyterians) and American Congregationalists (Independents). But the regulation of 1712, (Premier Traité d'Arau) by which the parties, whether Catholic or Protestant, who had the first occupation, were to leave the Church in the summer by eight in the morning, and in the winter by nine, would, perhaps, as little fall in with our social arrangements as it would accord with the ardour of our religious animosities.

of the people the use of public religious edifices, erected by the munificence of their ancestors, and upheld by contributions levied upon themselves, or the propriety of forbidding the performance of those very rites for the more imposing exercise of which that munificence was especially called forth, I have felt little interest in the proceedings which have taken place in and out of parliament with reference to the measure which is now before the legislature.

Lately, however, the question has assumed a *legal* form. On the 31st March a Letter appeared from His Majesty's Attorney-General to Lord Stanley. This letter has produced answers in pamphlets, newspapers, and magazines, abounding in sarcasm, misrepresentation and gratuitous assertion, but, for the most part, equally deficient in accurate reasoning and in patient research (*a*).

I believe it is generally admitted, that, provided the authorities are both fully and fairly cited in the letter to Lord Stanley, that publication has shewn—

First, That the repairs of the church were originally a burthen upon the tithes, (or rather that the tithes were granted to the rector in consideration, inter alia, of his keeping the church in repair,) and that matters continued upon this footing in England, until the liability was transferred to the parishioners, upon whom in a certain sense, it now rests,—the rector being relieved from the principal part of the burthen, though retaining the whole consideration.

Secondly, That the mode of enforcing this extraordinary liability was by a proceeding *in rem*,—interdict or suspension of celebration of divine service in the neglected church; and that it is at least questionable, whether the terrors spiritual and temporal of an excommunication, could be legitimately employed for this purpose.

(*a*) In this controversy the suaviter in modo and the fortiter in re have suffered under the influence of a double elective attraction, the mildness clinging to the argumentative substance, the vigour laying hold of the objurgatory mode. The latter conjunction cannot, I think, be too much regretted at a period when the organs of a party, which boasts that it embodies the wealth and chivalry of England, appear to consider it to be to the advantage of their employers to adopt a tone once so successful in sharpening the pike of the sans-culotte and the axe of a revolutionary tribunal.

Thirdly, That the assessing of a church-rate cannot be compelled by any court of common law.

But it is said that the advantage gained by the Attorney-General is only apparent,—that he has negligently or intentionally passed over in silence authorities which would have disturbed his conclusions,—and that the cases brought forward by him would have produced a different effect if they had been more fully presented. How far these charges are well-founded, or in what degree they are to be ascribed to the natural unwillingness of an antagonist to admit an unfavourable result,—whether the argument of the Attorney-General has been fairly torn to pieces, or whether, after sustaining some rather fierce assaults, he remains—fortis, et in seipso totus teres atque rotundus—are questions upon which, if your lordship has time and patience to go through the following observations, you may, perhaps, find little difficulty in coming to a satisfactory conclusion.

The first of these points may rather be considered to fall within the province of the antiquary, and to be interesting to the historian and to the general reader, merely as affording examples of the encroaching spirit of the clergy, or to speak, perhaps, more correctly, of men having strong corporate interests, with peculiar opportunities of advancing them.

I propose to notice shortly the authorities which have been adduced upon this head, and then to examine more fully the other points in dispute.

I. The position that the repairs of churches were originally a charge upon the tithes, does not appear to depend upon the character of the religious establishments of the Britons. The southern parts of the island, with the exception of some mountainous districts extending to the west of the Exe and the Severn, after they had been laid waste by fire and sword, were possessed for 200 years by semi-barbarous pagans ; and any discussion respecting the institutions which accompanied the antecedent profession of Christianity by the expelled or murdered inhabitants, would appear to be little less irrelevant than an inquiry directed to a period also disconnected, but still more remote, when that portion of the earth's sur-

face which Great Britain now occupies, produced the vegetables and supported the animals of the torrid zone.

I must here express the surprise which I felt when my attention was first drawn to the controversy, in reading upon the title page of a pamphlet "The Principle of Church Rates from the earliest Evidence of their existence, comprising a period of nearly *Twelve Hundred* Years," I was at a loss to conceive by what ingenuity church rates could be carried back some centuries beyond the period at which it is generally understood the clergy succeeded in convincing the laity that it would be meritorious to pay the rector for repairing the church, and then to do the work themselves. My admiration was lessened when I discovered that this startling proposition was founded upon a play upon the double meaning of a word used in translating into Latin an Anglo-Saxon term corresponding with the Latin word in only one of the significations of the latter. Wilkins (*a*) gives an ordinance of King Ina respecting the annual money payment or contribution made in November for the support of the clergy. The term cýric-ꝑceat, church-scot, (*b*) by which this contribution is described in the supposed law, is rendered by Wilkins, correctly enough, by census ecclesiæ (church revenues), "census" being treated by Wilkins in his glossary as equivalent to "vectigal." But Mr. Swan, the author of the pamphlet to which this high-sounding title-page is prefixed, adds this note, "Agere censum is, according to Ainsworth, to take an

(*a*) Leges Anglo-Saxonicæ, 15.

(*b*) Dr. Burn, in his Ecclesiastical Law, title "Church-Scot," says, "The church-scot, cýric-ꝑceat was an oblation for the first fruits of corn payable at Martinmas," for which he cites Bishop Stillingfleet's Ecclesiastical Cases, vol. i. 176. But Professor Whelock, in his preface to Wilkins, LL. A.S. shews the term to be applicable to all pecuniary payments. So in Lye's Saxon and Gothic Dictionary by Manning.

Sċæt is used in these collections in the primary sense of contribution or payment, from the Anglo Saxon ꝑcæꝛan (in Dutch and German, scheiden), to divide; and also in the secondary sense, of money generally, or of a particular coin of the value of the twentieth part of a shilling. The penalty for seducing the bipel (cup-bearer) of a ceopl, was six shillings; a slave of the second class, 50 scætta; a slave of the third class, 30 scætta. Leges Æthelbirthi, Wilk. p. 3, No. 16. And by No. 59, a black wound (ꝛýnꝛ) was to be compensated by 30 scættas. The same value is fixed by No. 71, p. 6, upon the nail of the great toe (mỳcel ꝛaan nægl), while all the other nails are valued at no higher than 10 scættas. So

account of the people and their estates—TO MAKE A RATE; census ecclesiæ must, therefore, be a *church rate.*" (*a*) The

ꝑomeꝼcæt (Romescot) or Romefeoh, is the payment directed by Ina to be made to the Roman church at the feast of St. Peter ad vincula; hence called Peter's pence. Ꝺcæt is also used in the sense of the German "Schatz," treasure.

In the Leges Eadmundi, in the tenth century, we find, Wilk. p. 72, No. 2, "concerning tithes and church-scots," "Tithes we command to each Christian man by his Christianity and church-scot and alms. If any one will not do this let him be excommunicated." P. 73, No. 5, "Concerning church repairs:" "Also we say, that each bishop repair God's house *of his own*; also let the king admonish him that all God's churches be well provided (ꝺehoꝼene) as to us is much necessary." So by the Council of London (A. D. 944), the bishop is to restore "Domum Dei de suo proprio" on hiꝼ agnan, 1 Wilk. Conc. 215. Thus, notwithstanding church-scot, the church is to be repaired by the bishop from his own private means.

In the next century, among the constitutions of Ethelred II., we find the following law (Wilk. L. A. 113), "And concerning tithes, the king and his wise men have chosen and said, as it is right, that the third part of those tithes that to church belong go to *church repairs* (*b*), a second part to God's servants, a third to God's necessitous (*c*) and to poor slaves (*d*);" yet the same constitutions contain provisions for the payment of the tithes of the increase of cattle at Whitsuntide, and of the fruits of the earth at the Equinox, or at Allhallown-tide, of Peter's pence on St. Peter's day, and of *church-scot* (*e*) at Martinmas; shewing that the church-scot was paid at a period when the repairs of the church continued to be a charge upon the tithes.

The laws of Canute, also in the eleventh century, as given in Wilkins, direct that church-scot be paid at Martinmas (p. 130, No. 10), and intimate (No. 63) "that properly (mid rihte) all the people ought to contribute to the repairs of churches."

This suggestion, put into the mouth of the royal convert, may have been the first step, in an imperceptible progress, towards the modern practice; and it is remarkable that, in the hereditary dominions of this Danish prince, it became a maxim, that churches were to be built by their kings, "Konungar skal Kioerckio byggia." Wilk. Legg. Anglo-Sax. 73. The encroachment upon the laity is distinctly traced in a pamphlet entitled, "A few Historical Remarks on the supposed Antiquity of Church Rates, and the threefold division of tithes, by a lay Member of the Church of England."

(*a*) It would have afforded some consolation to Papirius and Sempronius, whom "*censui agendo* populus suffragiis præfecit" when considered as not sufficiently substantial to support the consular dignity (quorum de consulatu dubitabatur ut parùm solidum consulatum explerent), could they have known that they were the antetypes and prefigured the dignity of churchwardens elected by the major part of the parishioners in vestry assembled. No glimmering, however, of this future glory

(*b*) Cýꝛicbot (church-bote), sustentatio vel refectio ecclesiarum, *Lye.* Thus "housebote" means those supplies of timber &c. which are necessary for the reparation of houses.

(*c*) ꝼeaꝛꝛum, corresponding precisely with the German dürftigen.

(*d*) ꝼeoꝛhlinga, servuli, *Lye.* (*e*) Cýꝛic ꝛceat.

author thus confounds the original census, or public inscription of persons and property, (made with a view, not to taxation, in the modern sense of that word, but to numeration and classification (*a*),) with the secondary signification of the term as denoting revenue, ascertained and recorded by the census.(*b*)

Unfortunately, however, if the word census in "census ecclesiæ" is, for the sake of this pun, to be understood in the same sense as in "censum agere," the census ecclesiæ would be not a rate made upon other property in relation to the church, but an assessment of the church itself in respect of the possessions of the church.(*c*)

The subsequent reference in this pamphlet to the census ecclesiasticus, mentioned in the laws of Edgar,(*d*) carries the case no further. The word in the original is cýnic-ġeat.

From the admitted fact that, by the common usage of England, the burthen of repairing the nave of the church falls upon the parishioners, it seems to have been inferred that this liability must have been coeval with the erection of churches. This is a view of the subject for which it is not very difficult to account. The common law consists of such regulations relating to temporal rights, as pervade the whole realm and are not founded upon any statute now extant. This negative description applies to all regulations which are received as common law; yet one of these regulations may have been brought into this island in the fifth century from the shores of the Eider, the Elbe, or

appears to have reached the eyes of the historian, who, writing 400 years later, merely adds, "Ab re *censores* appellati sunt."—T. Liv. IV. 8. After this important discovery of the connexion between census and church-rates, which has been proclaimed triumphantly from the Thames to the Tweed, can it be right to refuse the appropriate designation of *censualists* to those who have annihilated time and space, to make churchwardens happy?—ab re *censuales* appellati.

(*a*) Ἀπογράφεσθαι, Luc. i. 1. Ἀπογραφὴ, Luc. i. 2.

(*b*) When Justinian says "sine *censu et reliquis* fundum comparari non posse," must he not, according to the censualists, mean that the purchaser is to pay "to king, church and poor?"

(*c*) This would be such a census ecclesiæ as was made by the parliamentary commissioners in 1649, with a view to the alienation of church lands for the purposes of the state.

(*d*) The reference is to Wilk. Concilia, 245; but the law, or rather exhortation is given more fully in Wilk. Leges Anglo-Saxonicæ, p. 186.

the Weser; a second may have arisen out of a law of Alfred, or a constitution of Henry the Second; and a third may have crept in during the present century, under the shadow of an usage continuing for twenty or thirty years. As the law takes no notice of the origin of these particular regulations, they are, for all practical legal purposes, taken to be of equal antiquity. But it would be scarcely more reasonable to draw an historical inference from this legal fiction, than to say that, because the law recognises no priority between events which occurred before the time of legal memory (7 July 1189), it must be taken as an historical fact, that Ina, Alfred, William the Conqueror, and Henry II., all lived and reigned together.

II. The position that where parishioners neglect to repair their church pursuant to the new obligation imposed on them, a parochial interdict or suspension of the celebration of divine service within the parish might be inflicted (*a*), does not appear to be doubted.

In considering whether the reparation of the parish church could be enforced by process of excommunication, it is necessary to bear in mind the distinction between the obligation to make a rate, and the liability to pay the amount after it has been duly assessed. The power of excommunicating for refusing to *pay* a rate duly made has not, I believe, been of late controverted. This being undisputed, cases in which it has been acted upon are employed to supply the deficiency of authority in support of the power of compelling parishioners to *make* a rate. From the ecclesiastical law as stated by Lyndwood (*b*), it would rather appear that in the former case no sentence of excommunication can be pronounced. He says that the penalty of excommunication cannot be inflicted upon parishioners collectively (in universos); but it may be inflicted upon parishioners individually (in singulares personas singulariter) who are (personally) guilty. I am also, says he, of the same opinion as to suspension, which punishment cannot be inflicted upon parishioners as a whole; but if the default be excessive, the archdeacon

(*a*) Lyndw. Provinciale, page 28 a, edition of 1505; p. 53, ed. 1679.
(*b*) Ibid.; and see *ante*, page 2, note (*a*).

may impose a penalty, that after the expiration of a certain term, no divine service shall be celebrated in the church until the necessary repairs have been done, and thus the *parishioners* may be punished by the suspension and interdict of the *place*. If, however, there be any who are bound (*a*) to contribute to the repairs, who, though able, are remiss, such persons the archdeacon may, after monition, compel to such contribution by the penalty of excommunication. But whether churchwardens, who are persons chosen for such repairs and for otherwise administering the goods of the church, may, by excommunication, suspension, or other remedy, be compelled to repair, I think, that if they can have sufficient for the repairs, and are negligent in this respect, they may be compelled by censures; and, that on the other hand, if the fault be not with them (si per eos non steterit) they ought not to be proceeded against. But by prescriptive usage, the archdeacon sometimes imposes *pecuniary penalties*, particularly in cases of *church repairs*." He then goes on to inquire into the application of the penalties when incurred.

In the statute of Circumspectè agatis, 13 Ed. I. it 1284. is said that if prelates impose a penalty for an uninclosed cemetery, for an uncovered (*b*) or not decently adorned church, *in which cases no other than a pecuniary penalty can be inflicted*, and for certain other articles, the ecclesiastical judge has cognizance. It is, however, observable, that in the entry of the royal assent, this article of cemeteries and churches is omitted, and it is expressly stated in that assent that a prohibition lies when a *pecuniary penalty* is sought to be recovered before the ecclesiastical judge.

Dr. Nicholl (*c*) finds fault with the Attorney-General for

(*a*) Tenentur. This term would include liability under a rate, liability by possession of the whole parish, and liability *ratione tenuræ* or *occupationis*. Thus the Ecclesiastical Court has authority to proceed against the tenant of a house for nonpayment of wax, where, by an (undisputed) immemorial parochial custom, *each* house within the parish is bound to furnish *one pound* of wax annually, to support a taper to be burnt before the crucifix in the parish church. Registrum Brevium Originalium 51; Fitzherbert's Natura Brevium 52 C. In such a case, the custom not only creates the obligation, but fixes and assesses the rate.

(*b*) So as to hinder the performance of divine service. Binsted *v.* Collins, Bunbury's Reports, 231.

(*c*) Page 17.

citing earlier parts of this statute as an authority for classing the repairs of churches amongst merè spiritualia, which he attributes to an omission by the Attorney-General, *in his own favour*, of some intervening words, which, though in themselves irrelevant, would, it is alleged, by disconnecting the passages cited, have shewn that the statute gave no colour to the position in support of which it was vouched. Yet in 1608 and again in 1679 (*a*) the Court of K. B. adopted the very construction which is imputed to the Attorney-General as a crime. Having obtained this supposed victory the learned civilian goes on to say, "the [non]-repair of churches is a distinct and separate head or class of offences, of which the conusance is, by this act, allowed to the spiritual court, *though previously belonging to the temporal courts, inasmuch as the obligation was per consuetudinem notoriam et approbatam.*" This is a tremendous leap. Because a custom, pervading the whole realm with relation to a *temporal* matter, is part of the common law, therefore a custom relating to a *spiritual* matter, as contradistinguished from the commune jus, or canon law of christendom, must be part of the common law (*b*). But, it will be observed, this totally unfounded position,—that previously to the statute of Circumspectè agatis, the cognizance of the repairs of churches belonged to the temporal courts,—is not stated as matter of inference or of opinion; it is assumed as that which does not require even to be distinctly asserted. I incline to think, indeed, that a reader who was ignorant of the provisions of the statute, and still more if he were unacquainted with the language in which the statute is cited, would be led by the statement of the learned civilian to infer that the clause in italics was a part of this statute, which the Attorney-General had omitted to cite, by a "mistake in favour of his own argument."

The error into which the learned civilian has fallen is not only sufficiently evident upon the face of his own pamphlet, but would have absolutely stared him in the face, if he had

(*a*) Starkey *v.* Barton, *post*, 23; and in Farmer *v.* Browne, Freeman's Reports, 300, the Court said that a suit for the reparation of churches is a spiritual cause *and is particularized in the statute of Circumspectè agatis amongst the merè spiritualia.*

(*b*) According to this mode of reasoning, a custom relating to a temporal matter is part of the common law because it is general, but a custom relating to a spiritual matter is part of the common law, because it is *not* general; for if it were general, the canonists would call it not consuetudo but commune jus.

looked at the passage in Britton to which Mr. Swan refers. Britton, writing eight years before the statute of Circumspectè agatis, speaks of *amendments of cemeteries and defects of churches*, as matters of which the holy church ought to have cognizance, in order that her franchises might be unblemished,—thereby implying that, even in 1277, no *new* jurisdiction was given to the ecclesiastical courts of matters which had previously fallen within the cognizance of the courts of common law, but that the king merely intended to acknowledge and confirm an ancient right.

This is an unfortunate instance of inaccuracy in a party who is objecting, in no very friendly terms, to a mistake which if committed would be such an oversight as not unfrequently occurs to persons having the misfortune to draw or settle pleadings, who are sometimes very unpleasantly reminded of their inadvertence in striking out irrelevant matter and thereby making the context less coherent. The Attorney-General, if disposed, like Duncan, to bear his faculties meekly, will not perhaps exclaim—

Ὡς ἀπόλοιτο καὶ ἄλλος ὅτις τοιαῦτα γε ῥέζοι·

But even if the construction of the statute which the Court of K. B. in 1608 and in 1679, as well as himself, in 1837, have adopted, were wrong, he might fairly say—

O major tandem parcas, *incaute*, minori.

1409. In M. 11 H. 4, fo. 12, pl. 25, is a case which appears to have escaped the diligence of the censualists. Hull, J. of C. P., speaking of bells which had been annexed to the church, says, "Upon the visitation of the ordinary, if the bells are not supported (sustents) the parish shall be punished and coerced (arctes) to support them." (*a*) The mode of punishment or coercion,—whether by interdict or whether, like Cicero's slaves, they were to be "vinclis ac custodiâ *arcti*," (Cic. Tusc. Quæst. II. 21.) we are not informed.

I do not consider this dictum as of much importance, but I insert it because it appeared to form a link in the history of the law of church rates.

1674. In Rogers v. Davenant the question was, whether a bishop may empower commissioners to tax and rate

(*a*) He objects, however, to bells being ranked with things necessary for the *support* of the church, because on the contrary bells make the church tremble.

parishioners for rebuilding a church. The unanimous decision of the court that he could not, was referred to by the Attorney-General. He is charged with disingenuousness in not also stating an *obiter dictum*, or rather a gratuitous lecture to churchwardens, (possibly from the reporter,) upon a point not before the court, and upon a subject in respect of which the courts of common law are presumed to be ignorant, (*a*) and of which statements totally differing from each other are given not only in Freeman, 286, where the case is reported as anonymous, but also in the same book of reports, viz. 1 Modern Reports, 194, 236, and 2 *Mod.* 8; the last of which is relied upon by the advocates of church rates, in which it is stated to have been "agreed that the Spiritual Court has power to compel the parish to repair the church by their ecclesiastical censures; but that they cannot appoint what sums are to be paid for that purpose, because the churchwardens by the consent of the parish are to settle that. As if a bridge be out of repair, the justices of peace cannot set rates upon the persons that are to repair it, but they must consent to it themselves. These parishioners here who contribute to the charge of repairing the church may be spared; but as for those who are obstinate, and refuse to do it, the Spiritual Court may proceed to excommunication against them; but there may be a libel to pay the rates set by the churchwardens." It is not clear that the passage, as it stands in 2 Mod. 8, means anything more than this, that for the nonpayment of a rate the obstinate parishioners may either be excommunicated for their contempt, or libelled against in the Ecclesiastical Court. But the dictum, as differently given in Freeman, does not appear to be open to that construction.

As the case of Blank v. Newcomb has been cited, I will shortly advert to it, though it is reported only in 12 Mod. 1699. Rep. and in a publication containing cases which being alleged to have been decided by Lord Holt, are commonly called Holt's Reports. Of 12 Mod. Mr. J. Buller says, (*b*) "that it is *not a book of any authority*;" of Holt's Reports, (*c*) Lee, C. J. says, "that it is *a book of no authority*," thus slightly varying the form of the *panegyric*. This case,

(*a*) Vide *post*, 18. (*b*) 1 Dougl. 83. (*c*) 1 Wils. 51.

which appears the same, *totidem verbis*, in 12 Mod. 327, and Holt, 594, was referred to as showing that the Ecclesiastical Court cannot make a rate or appoint commissioners to do it. It would, perhaps, have been more correct to pass over such a case in silence. The complaint, however, is, not that the Attorney-General has cited a book of no authority, but that he has omitted the following passage in the judgment of Holt C.J. which is stated to be most important:—"The right course is for the Spiritual Court to give sufficient notice to the parish to meet and make a rate for the reparation of the church; which if they do not do, they may be excommunicated." As this passage, which contains an *obiter dictum*, stated, if not invented, by an incorrect reporter, was irrelevant to the question supposed to be decided, namely, whether a church rate, not made by the majority of the parishioners, was binding, there seems to be no great reason to complain of the omission. It may also be observed, that this supposed dictum is open to the objection that the course would be for the Spiritual Court to give notice, not to the parish, but to the churchwardens, and that it does not distinctly appear who are to be excommunicated.

1799. The case of Gaudern *v.* Selby, represented, it is to be hoped incorrectly, as decided before Sir William Wynne, appears to be so entirely vicious throughout as to be entitled to no weight. According to the statement, the decision was—that one churchwarden, without showing that he was sole churchwarden, or giving any account of his companion,—may of his own authority, and contrary to the determination of the parishioners,—impose a retrospective (*a*) rate for the purpose of paying himself a sum which he chooses to claim as expended for the parish,—but which he never ought to have expended, and which it does not distinctly appear he ever did expend; and that he may enforce the payment of a rate so imposed by a libel in which it is falsely alleged that the rate was made by the greater part of the inhabitants. It would, perhaps, be difficult to find another decision in which such a variety of objectionable matter was crowded into so small a space.

Dr. Nicholl (*b*) considers Gaudern *v.* Selby to be supported

(*a*) *Post*, 30. (*b*) Page 44.

by Parker *v.* Clerke.(*a*) In that case money was due by custom to the parish clerk, and it was *part of the custom* that the amount should be levied upon the inhabitants by the churchwardens. A prohibition being moved for against a suit by the parish clerk in the Ecclesiastical Court, it was said by Holt, C. J., that both the office of parish clerk, and the custom of levying the rate by the churchwardens, were temporal matters, and therefore an action would lie against the churchwardens for not making a rate. The other judges differed in opinion from Lord Holt; and it does not appear what became of the case.(*b*)

It is perhaps to be regretted that those who feel interested in the reputation of Sir William Wynne, did not show that the learned Dean of the Arches was charged upon insufficient grounds, with having pronounced the judgment in question; or, if that could not be done, and the case was not altogether supposititious, that they did not exert their influence to withdraw from observation those maculæ—

——— quas aut incuria fudit,
Aut humana parum cavit natura.———

It must, however, be admitted that this is an unpleasant part of the subject. The ecclesiastical laws were considered under Henry VIII. as of too oppressive a character *for the times*, and they were continued merely provisionally, though the intended revision has not yet taken place. That the system was armed with sufficient power may be inferred from the circumstance that it enabled that active *official-principal*, the Duke of Alva, to dispose of 16,000 contumacious Flemings, &c. in less than five years without the aid of the inquisition;(*c*)

(*a*) 3 Salk. 87, more fully reported 6 Mod. 252. The *apocryphal authority* of Modern Reports (to borrow an expression from the learned editor of Freeman's Reports, Mr. Smirke,) is well known; and of 3 Salkeld Lord Hardwicke says, (2 Atkyns, 70,) that it is a book of no authority.

(*b*) Dr. Nicholl says, "but no doubt was entertained that the churchwardens might make a rate; and if a special custom would give the power, why not the Common Law?" This question might, perhaps, silence any person who should maintain that the idea of churchwardens making a rate proprio vigore involves a physical or moral impossibility; but until such gainsayers shall arise, the observation appears to be one of little value. It cannot affect those who merely maintain that no such power *is* given by the Common Law.

(*c*) In a despatch dated in August, 1566, from Philip II. to the Duchess of Parma, who preceded the Duke of Alva in the government of the Netherlands, the King

It would therefore not be surprising, if, up to the passing of 53 Geo. III. c. 93, the ecclesiastical courts possessed the power of destroying, by imprisonment, the bodies of those persons of of whose souls they had, pro posse suo, already disposed. And Dr. Nicholl, in his late pamphlet, has produced some instances which have passed sub silentio, in which the Ecclesiastical Courts appear, notwithstanding the provisions of the statute of Circumspectè agatis to the contrary, to have proceeded *personally* against parties refusing to concur in making a rate.

Be this as it may, the supposed efficacy of ecclesiastical censures in compelling the assessment of a church-rate, or even in enforcing the payment of a rate formally made, appears to rest upon two abuses—usurpation, in some cases—profanation, in all; usurpation, where the victim is not (and, perhaps, never was) the spiritual subject of the prelate, by whose authority the curse is pronounced—profanation, in the use of religion in obtaining money under the false pretence of anxiety for the eternal welfare of the party at whose breast the spiritual weapon is levelled. (See the Postscript, *post*, 43.)

III. The third position of the Attorney General, is, that the assessing of a church rate cannot be enforced by any court of common law. It has been stated (*a*) that it is one of the recognized maxims of the law of England, that there is no wrong, public or private, without its proper remedy; and that Sir William Blackstone says, when any thing consonant to right and justice appertains to a man's office and duty, and there is no other specified mode of compelling the performance of it, the Court of King's Bench is bound to grant a writ of mandamus. For this, 3 Black. Comm. 110 is cited; but with the assistance of this reference I have been unable to find this position distinctly laid down; which is the more to be regretted, because had a passage to this effect been found, the reader would have been able to form an opinion as to its force by the weight of the case or authority referred to (*c*). If it is meant

says, 'After long and mature deliberation my decision is, that the *episcopal jurisdiction* being lawfully established, I am content that the *Inquisition* cease.

(*a*) Deacon, "Another Letter to Lord Stanley," page 4.

(*c*) In Ridgway's Irish Term Reports, 310, (Greerson v. Jackson,) Lord Fitzgibbon C. says, "Mr. J. Blackstone was certainly a very ingenious man, and his book has great merit considered as a book of lectures delivered in an University. But his Commentaries are not authority, and if any man looks into his Chapter of

to be said that there is no common law right without a common law remedy, the observation amounts nearly to a truism; because unless the *remedy* exist it is not perhaps in legal strictness a *right;* (*a*) but to make the position of any weight in this controversy it must extend to this: that for every right, whether of a civil or of an ecclesiastical nature, the courts of common law are bound to provide a remedy by the ordinary way of action, or by the extraordinary course of mandamus. In this sense I have no hesitation in stating my opinion that the position is not and never was law.(*b*)

In point of charge there is a material difference between tithes and church rates. Tithes are not merely a charge upon the land; they are part and parcel of the profits of the land; whereas church rates are a charge upon the person in respect of ability as measured, generally, though not universally,(*c*) by the possession of land. But in respect of remedy it will hardly be contended that church rates stand upon higher

Remitter he will see it." And in 1 Schoales & Lefroy, 327, (Shannon *v.* Shannon,) Lord Redesdale says, "I am always sorry to hear Mr. J. Blackstone's Commentaries cited as an authority. He would have been sorry himself to hear the book so cited. He did not consider it as such."

The *censualists* (those who have won 400 years, by their discovery of the flexible quality of the term *census*) appear to have found in Blackstone, Modern Reports, Holt, 3 Salkeld, and Comberbach, an inexhaustible treasury of bad law, suited for every occasion. They do not, however, cite Barnes's Notes, in which Lord Tenterden used to say an authority could be found for any thing.

(*a*) Dr. Nicholl (p. 18) and Mr. Swan (p. 16) cite the case of Ashby *v.* White, 1 Salk. Rep. 21, in which Lord Holt said, "If a man have a right, he must in consequence have a remedy to vindicate that right; for want of right and want of remedy is the same thing. If a statute gives a right, the common law will give a remedy to maintain that right; *à fortiori*, where the common law gives a right, it gives a remedy to assert it." This is an unfortunate case to produce in support of the general authority of the Courts of Common Law to provide a remedy in matters *alieni fori*. Ashby *v.* White was an action against the returning officer of the borough of Aylesbury for rejecting the plaintiff's vote at an election. The defendant insisted that the right to vote was matter for the decision of the House of Commons, and that the Courts of Law *could not entertain the question;* and that, therefore, no action could be maintained. In the King's Bench three judges held that the action was not maintainable; Holt, C.J., held the contrary. In The Queen *v.* Patey, which arose out of Ashby *v.* White, the defendant had been committed by the House of Commons, and was brought into King's Bench by habeas corpus; when it was solemnly determined that the Court could not enter into the merits of the commitment, and the defendant was remanded. "Lord Holt differed from the eleven judges who were consulted on the case, but every judge from that time has dissented from his opinion." (Report of Select Committee on Publication of Printed Papers, 8th May, 1837, p. 14, 26.)

(*b*) *Post*, 31. (*c*) *Post*, 21, 21.

grounds than tithes; yet I take it to be clear that no mandamus ever issued or could issue requiring the party to set out his tithes. (*a*) It is true that since the 2d and 3d Ed. 6, c. 13, a statutory remedy by action of debt is given in the case of a refusal to set out a particular class of tithes. But before that statute no remedy was, I believe, ever sought in any other than an ecclesiastical court, either for the nonpayment or for the not setting out of tithes, except in the case of tithes alleged to be due to the King or to his presentees, farmers, or accountants, which, as being directly or indirectly parcel of the royal revenue, have by prerogative, from a remote antiquity, been recoverable in the Exchequer. Here, then, is a case of an undisputed duty claimed against a specific individual; yet it appears never to have occurred to the most strenuous asserter of ecclesiastical rights to invoke the assistance of the secular arm in the shape of a mandamus to set out tithes.

If, upon a review of the authorities, it shall be found that matters of a nature purely ecclesiastical cannot be brought directly within the cognizance of the courts of common law, and that the assessing of a church rate is a matter of a nature purely ecclesiastical, it will necessarily follow that the assessing of a church rate cannot be compelled by a court of common law.

To the first position, the authorities which are applicable appear to be Bracton,(*b*) Britton,(*c*) Fitzherbert,(*d*) Jeffrey's case,(*e*) Sir Robert Lee's case,(*f*) Holland *v.* Kirton,(*g*) Starkey *v.* Barton,(*h*) Churchwardens of Claydon *v.* Duncomb,(*i*) Rex *v.* Archbishop of Canterbury,(*k*) and Lionel Copley's case. (*l*) Some of these authorities also bear upon the second position. The other authorities shew the power vested in the majority of the parishioners to bind the residue.

The courts of common law have always admitted their want of power and even of knowledge in matters of ecclesiastical jurisdiction. This has been carried to an extent almost
1430. ludicrous. Thus, in the Fountains Abbey case,(*m*)

(*a*) See Phillips v. Davies, 8 East, 178.
(*b*) *Post*, 19.
(*c*) *Post*, 19.
(*d*) *Post*, 21.
(*e*) *Post*, 21.
(*f*) *Post*, 22.
(*g*) *Post*, 23.
(*h*) *Post*, 23.
(*i*) *Post*, 26.
(*k*) *Post*, 30.
(*l*) Hardres, 406.
(*m*) Year Book of Mich. Term, 9 Hen. VI. fo. 32. pl. 34.

Paston, J. says "if a man marry his *mother*, this is a lawful marriage *with us* till it be defeated; for when the banns and espousals are made *in facie ecclesiæ*, that is sufficient for us, and it does not belong to us to inquire whether this be a *lawful* marriage or not."

Bracton has nothing specifically about *repairs* of churches or cemeteries; but he says, (*a*) "it is to be 1269
known that prohibition in the Ecclesiastical Court is not to be granted (locum non habebit,) concerning anything spiritual or annexed to spirituality, whether the suit be between clerks, or between a clerk and a layman, or where the suit arises out of testament or matrimony, or concerning anything for which penance is to be enjoined for sin. Also prohibition is not to be granted if there be a suit in the Ecclesiastical Court concerning a tenement which is sacred, and consecrated by the prelates to God, as an abbey, priory, or monastery and their cemeteries; also things which are 'quasi sacra,' because annexed to spirituality, as are lands given to churches at the time of their dedication, with the buildings thereon and the appurtenances."

Britton,(*b*) speaking in the name of the King (Edw. I.), says—"We will that Holy Church have her franchises 1277.
unblemished, so that she have cognizance to judge of pure spirituality, of testament, of matrimony, of bigamy, and of felony of her clerks, and in correction of sins; provided, (*sauve*) that the ordinaries take no money or its worth from the laity, nor cause judgment to be given for the gift (*c*) of any one, but only of testament, matrimony, and pure spirituality, and of *amendment of cemeteries* and *defects of churches*, and of mortuaries and tithes (*c*) without our prejudice."

The 35 Edw. I. stat. 2, sect 2, after reciting that trees are often planted to prevent the force of the wind 1307.
from hurting the Church, prohibits the rector from felling them down promiscuously (indistinctè), but when the chancel wants necessary reparations; and directs that they shall not be converted to any other use, except the body of the Church need like repair. "In which case the rectors of poor parishes of their charity shall do well to relieve the pa-

(*a*) Lib. v. cap. 10, fo. 407. (*b*) Lib. i. cap. 4. (*c*) Corrections of 2d ed.

rishioners with bestowing upon them the same trees, which we will not command to be done, but we will commend it when it is done."

This enactment has been cited to show the *antiquity* of the obligation on the part of the parishioners to repair the Church. But none of the opponents of Church-rates appear to have assigned a more recent date to the supposed obligation. The statute therefore proves what has not been called in question.

1370. In a case reported in the Year Book of Edw. III.(*a*) the defendant avowed the taking of a distress on the ground that at a meeting of the parishioners for repairing their church, a sum of 10*l.* was taxed for the repairs, which sum they assessed by assent amongst themselves by certain rates, according to the quantity of land and the number of *cows and sheep* held by each parishioner, and that the plaintiff had lands, sheep, and cows; so that the sum paid in respect of them amounted to 9*s.*, that collectors were appointed, of whom the defendant was one, and that it was assented that if the parties taxed would not pay the collectors might distrain; that the plaintiff would not pay, whereupon the distress was taken, and that such custom had existed in the parish before time of memory. It was objected on the part of the plaintiff, that, the taxation being in an ecclesiastical matter, the amount ought to have been levied by compulsion of the ordinary,—and that the assent, to be binding, ought to be under seal. The Court held that the custom was good, and that the plaintiff was bound to take issue upon the assent, *i. e.* that such assent was binding if it existed in fact.

This case shows not only that in 1370 church rates were made by the assent of the parishioners, but also that such usage had been of very long standing; as otherwise no immemorial custom (which to be valid must then have existed nearly 200 years) could have attached to such usage.

The same practice is recognized in Hobart, 212;(*b*) and also in 5 Co. Rep. 63,(*c*) where it is said that the majority of the parishioners shall bind the remainder, without any special custom for that purpose.

(*a*) T. 44 E. 3, fo. 18, pl. 13.
(*b*) Norris *v.* Staps.
(*c*) Chamberlain of London's case.

Fitzherbert (*a*) says, "If the Bishop cite any of the parishioners to be contributory to the repairs of the parish church, and the party who sues a prohibition to the Bishop surmises that he is impleaded in the Spiritual Court of his lay fee, a consultation (*b*) shall go." It does not appear from Fitzherbert, or from the Registrum Brevium Originalium, upon which F. N. B. is a commentary, whether the defaulter had or had not been *rated* to the repairs of the church. The issuing of a consultation under the circumstances stated in Fitzherbert and in the Register (*c*) merely shows that the repairs were not to be considered as a burden upon the lay fee, (in other words, upon the real estate,) so as to entitle the party sued,—whether it was for nonpayment of a rate, or for not concurring in making a rate,—to the interposition of the temporal courts; and that the jurisdiction of the Spiritual Court was founded upon this distinction. 1535.

In Jeffrey's case, Sir Christopher Wray, C. J. (*d*) is stated to have said, "That forasmuch as the conusance of the reparations of churches doth belong to the Spiritual Court, it was necessary to hear the opinion of those who profess the ecclesiastic law as to this point; and so it was done. And thereupon divers of them under their hands in writing did certify their opinions, that Jeffrey (who resided in another parish, but occupied land in Haylesham) by their law was a parishioner of Haylesham as to this purpose, and chargeable to the reparations of the church of Haylesham: and that the churchwardens *and greater part* of the parishioners (on such general warning) met together, might make such a tax by their law—and that it *does not charge the land*, but the person in respect of the land for equality and indifferency." (*e*) So Peckius de Eccl. Rep. 39, ed. 1620. 1589.

This, as well as the Fountains' Abbey (*f*) case, shows that dicta of judges sitting in courts of common law, and speaking, *ultra crepidam*, upon the course of proceeding in the ecclesiastical courts, are of little weight; that the right of imposing the rate is in the parishioners; and that the charge is not upon the land, but upon the person, in respect of his ability

(*a*) Fitz. Natura Brevium, 50 N.
(*b*) A writ permitting the ecclesiastical judge to proceed. (*c*) Folio 44.
(*d*) 5 Coke's Rep. 67, b. (*e*) *Ante*, 20; *post*, 23, 28. (*f*) *Ante*, 18.

evidenced by his possession of land. This distinction is important. It is not, as it is now convenient to represent it, a miserable modern quibble, but was set up by the ecclesiastical courts themselves as the very foundation of their claim for exemption from the control or interference of the king's temporal courts. Upon the landholder insisting that the ecclesiastical courts were seeking to impose a burthen upon his lay fee, the answer was "No, we only proceed in personam, looking at the land you occupy, with the cattle you possess, as a fair criterion of your ability to contribute."

1595. In Methold *v.* Winne (*b*) it was adjudged that the churchwardens, *by the assent and agreement of the parishioners,* may take the stones belonging to the church, and with part thereof repair a ruinous window of the church, and retain the rest to themselves in satisfaction of their expenses employed in the repairs of the said window.

1606. In the case of St. Saviour's Southwark (*a*), the Court of Exchequer held, that when an election is to be by the greater number of the parishioners, and the election is by a small number, *but there is no evidence that others of the parish, to a great number, did withstand or gainsay the election,* which was made at a day usual and place certain, and therefore all the parishioners by intendment were knowing of it, or might by intendment of law been present at the election; it being in an open place to which every parishioner might make resort: it was held that the election was as good as if all the parishioners had met and elected; for it were harsh in law, if the election by those that were present should not be good when the residue are wilfully absent." Both these cases recognize the general authority of the majority of the parishioners.

1607. In Sir Robert Lee's Case (*c*) it was held, that if a citizen of London erect a house in the parish of A. to dwell there in the time of sickness in London, and has no land in the parish, and is assessed 20s. for the reparation of the church, whilst others who have 100 acres of

(*a*) Lane's Reports, 21.
(*b*) 1 Roll. Abr. 393, translated 4 Vin. Abr. 526, pl. 4.
(*c*) 2 Roll. Abr. 289, translated 17 Vin. 575, pl. 6.

land pay but 6*d.*, still no prohibition shall be granted upon a suit for the 20*s.* in the Court Christian, because they have jurisdiction of the matter; and therefore they may order this according to their law.

In Starkey *v.* Barton (*d*) the Court granted a consultation upon a prohibition to a suit arising out of a church rate, because the temporal court hath nothing to do with the principal matter, viz. a tax laid for repairs, for that is *merely spiritual* and to be determined in the Court Christian. 1608.

In Willmore's case (*a*) it was held, that a man who had ceased to be a parishioner, was liable to be assessed to a Church-rate if he had ever belonged to the parish (sil unques fuit del parish), though not for ornaments. 1622.

And in the same Court and term, in the Churchwardens of —— case (*b*), is stated an obiter dictum of Lane, C. J., assented to by Chamberlain, (who had decided Willmore's case,) that for the reparation of the fabric of the Church (qu. the obligation) is real, and charges the land and not the person; but if it be for ornaments of the Church, then he said it is personal, and that if a man is not commorant within the parish, he is not chargeable in respect of the land, for such tax charges the goods only; and to this Chamberlain, J., agreed, and no one denied it. Neither of these two cases would now be considered as law; no such distinction between ornaments and repairs exists. The charge is *real* in the sense in which Lyndwood calls it *real*, when in the same sentence he says that it is measured by the quantity of land and *animals*—*real* as measured by *things*. In the feudal sense of the word in which it is now affected to be received, the charge is not real (*c*). 1622.

So it was held in Holland *v.* Kirton (*e*) that the Court had no jurisdiction to grant a prohibition where lands of the annual value of 60*l.* were rated at 100*l.* 1624.

(*a*) 2 Rolle's Reports, 262.

(*b*) Ibid. 270.

(*c*) *Ante*, 21, 22.

(*d*) Yelverton's Reports, 172. The case and point are referred to in Motam *v.* Motam, 1 Roll. Rep. 426. *S. C.* not *S. P.* 2 Brownlow's Rep. 215; Cro. Jac. 234.

(*e*) 2 Roll. Rep. 463. In this case it was doubted whether a custom to rate, according to value of sheep-walks, omitting houses and farms, was good, *post*, 25.

1627. In Popham's Reports, 197, a prohibition to the Ecclesiastical Court of Worcester was moved for, on the ground that the suit was for money assessed by the assent of the greater part of the parishioners of D. upon the plaintiff for the reparations of the church, to wit, for the recasting of their bells; the truth being that the charge was for the making of new bells, when there were four before. Another ground was, that the plaintiff had alleged a custom that he and all those, &c., have used to pay 11*s.* for any reparation of the church. But the prohibition was denied; and by Doderidge, J., in the book of 44 Edward 3, (*a*) there was a bye-law to distrain, which is a thing merely temporal. Et per Curiam.—In this case, the assessment by the major part of the parishioners binds the party, albeit he assented not to it; and the Court seemed to be of opinion, that the custom was not reasonable, because it laid a burden upon the rest of the parish. Littleton, of counsel of the other side, said, "suppose the church falls, shall he pay but 11*s.*? Whitlock, J. *If the church falls the parishioners are not bound to build it up again;* which was not denied by Jones, J." This case recognizes the power of the majority of the parishioners to assess a church rate; and also shows that the power of recovering church rates by proceedings at law, must depend upon some collateral common law right—in this case the existence of a bye-law.

1627. In a case (*b*) in which Roberts and others, in East Greenwich, were cited by the Spiritual Court to pay money which the churchwardens had expended in reparation of the church; the inhabitants alleged that the tax was made by the churchwardens themselves, without calling the freeholders; and also, that the moneys were expended in the re-edifying of seats belonging to their several houses, and that they never assented to their being pulled down. This allegation being rejected, the Court granted a prohibition upon the ground that the tax cannot be made by the churchwardens, but by the greater number of the inhabitants. In this case, the prohibition was granted upon the want of authority

(*a*) *Ante*, page 20. (*b*) Sir Thomas Hetley's Reports, 63.

in the churchwardens to make a rate, and not in respect of the application of the money—which would be matter of objection to the churchwardens' accounts, rather than a ground for refusing to pay the rate.

In Andrews v. Hutton (*a*) a party applied for a prohibition to a suit for a church-rate on two grounds; first, that the libel was upon a custom that the lands should be charged for reparations, and that customs ought to be tried at the common law; secondly, that by a custom in the parish, houses and arable land should alone be taxed for the reparations of the church, and that meadow and pasture should be charged with other taxes. But the Court held, that although the libel is by a custom, yet the other lands shall be dischargeable (*qu.* chargeable) at the common law; but the usage is to allege a custom. Secondly, that houses are chargeable to the reparation of the church as well as land. And thirdly, that a custom to discharge some lands (*b*) is not good. Wherefore, says the Report, a prohibition was *granted.* (*c*) In this case the libel appears to have been in the usual form, stating the liability to be by custom; but that custom not being laid as existing within a particular district, would import a general liability, extending over the whole realm; and therefore not in the nature (as the objection supposes) of a special custom, the existence of which it is competent to the adverse party to deny, and which, if put in issue, ought to be tried in a Court of Common Law. The allegation of a custom in the libel may, perhaps, be considered as an indication of the imperceptible process by which the obligation was transferred from the rector to the parishioners, though it is true the insertion of such an allegation may be attributed to an anxiety to distinguish between the local usage of England and the ordinary disposition of the burden, according to the rules of the canon law. 1628.

The decision in this case, that a custom, discharging some lands from the obligation to contribute to church rates, is not good, appears to be founded upon the principle, that church rates are imposed upon the *person* with reference to ability, and are not a charge upon the land; since if it were a charge

(*a*) Hetley, 130. (*b*) *Ante*, 23. (*c*) Probably a misprint for "denied."

upon the land, there seems to be no reason why particular landowners might not take upon themselves, by agreement, the whole liability; and if such an agreement would have been binding, the custom would be evidence of its existence, as in the case of repairs of bridges.

1638. In the Churchwardens of Claydon *v.* Duncombe(*a*) it was held, that where churchwardens sue J. S., surmising in their libel that he and all those whose estate he hath in certain land adjoining the churchyard have used to repair so much of the fences of the churchyard as adjoin the land, a prohibition lies, for this ought to be tried at the common law, because this is to charge a *temporal inheritance*. This decision proceeds upon the distinction between the spiritual right to the assistance of parishioners for repairs, and the rights of property, as existing in the church as a landowner, against adjoining landholders.

1671. In Thursfield *v.* Jones (*b*) one of the London Companies was assessed in respect of its hall to the repairs of the parish church, and a citation being issued from the Consistory Court against the officers of the Company, the Court of King's Bench refused a prohibition, on the ground *that the Spiritual Court had cognizance* of the matter, and had no other mode of proceeding against a corporation.

1673. In a collection of cases, called Ventris's Reports, published after the death, and therefore without the corrections of the collector or reporter, is the following case, printed at first as Anonymous,(*c*) but for which some subsequent editor, (probably considering that a case without a name was a sort of nullius filius, devoid of legitimate authority,) appears to have borrowed the name of Thursfield v. Jones from the preceding case, which had come before the Court two years before. A motion for a prohibition to a suit in the Ecclesiastical Court, for a churchwardens' rate, suggested that they had pleaded that it was not made with the consent of

(*a*) 2 Rolle's Abridgement, 287, pl. 52, translated 17 Vin. Abr. 567.

(*b*) Sir Thomas Jones's Reports, 187.

(*c*) 1 Vent. 367 For citing this case as Anonymous, the King's Attorney-General is, by one of his assailants, "*allowed to take his choice* between wilful mis-statement and culpable inaccuracy." 17 Law Mag. p. 389.

the parishioners, and that the plea was refused. The Court said that the churchwardens (if the parish were summoned, and refused to meet or make a rate,) might make one alone for the repairs of the church, (if needful,) because that if the repairs were neglected, the churchwardens were to be cited, and not the parishioners; and a day was given to show cause why there should not go a prohibition." This appears to be a loose note of an *obiter dictum*, the language of which is obscure and ambiguous. "A refusal to meet or make a rate" may be by parties asserting that they will do *neither;* in which case it would be clearly competent to the churchwardens, as *parishioners*, to make a rate by themselves; or the expression may have been used to denote separate refusals to do *each* of these things. In the former sense the dictum is consonant to preceding and subsequent authorities; in the latter, it appears to stand alone, without possessing those marks of deliberation, or even of authenticity, which would entitle it to much weight.

I shall take no notice of the transfusion of this case into Bacon and Viner, because every lawyer knows, that whilst the abridgments of Statham, Fitzherbert, Brooke, Rolle, and Comyns, when they directly or indirectly state their own opinions, are authorities per se, Bacon (except in his title *Lease*, and the few others which he obtained from Chief Baron Gilbert) and Viner are of authority so far only as they are found to have abridged faithfully that which was worth abridging, and in respect of a small number of original cases.

In Wheler v. Lambert (*a*) a prohibition was granted nisi to the Ecclesiastical Court, in a case where J. S. suing as churchwarden of St. Peter's, in Colchester, was stated to be not duly elected according to a custom, and a plea to this effect had been rejected in the Spiritual Court; but it appearing that J. S. was churchwarden de facto, and that he, with the inhabitants and another churchwarden, had made the tax, the rule for a prohibition was discharged; for, per Cur. where the question is only, who is churchwarden, if such custom is alleged, a prohibition shall be granted; but the matter here is for a tax for the repair of the church, and it is not material now whether he was duly elected or not. Be- 1675.

(*a*) 3 Keble's Reports, 533, but more fully reported from a MS. note, 1 Bac. Abr. 602, (6th edit.)

sides, this tax is not rated by the churchwardens, *for they have no such power;* but it is a common charge imposed by the major part of the parishioners, and the churchwardens do no more in assessing it than the other parishioners, and the tax will be well assessed by the major part of the inhabitants, though the churchwardens are against it: their chief business is in *collecting it;* and the matter is a matter of *ecclesiastical cognizance;* for the spiritual judge may inquire touching the want of reparations of the church. And upon the rule for discharging the prohibition all this matter was ordered to be entered, for fear it should be afterwards thought that a prohibition was denied where a custom was in question.

1685. In Watkins *v.* Seaman (*a*) the Court refused to grant a prohibition to a suit in the Ecclesiastical Court, upon certain objections taken in respect of a payment to poor prisoners, and for chimes in the church. I refer to it merely as showing the form of the libel, which states that after due notice the churchwardens, and the greater or a competent number of the parishioners of the said parish, assembled at the appointed day and in the usual place, and then and there with deliberation and indifferency made an equal rate, and imposed upon each parishioner according to the full value of the lands, tenements, and rents, which each parishioner had held or possessed in the same parish. Lyndwood, however, states the liability to be according to the quantity of land which the party possesses within the parish, and according to the number of his cattle. (*b*)

1688. In Woodward's case (*c*) a prohibition was granted upon a citation of a non-resident occupier, "for non-payment of a rate for the bells of the church, to which the inhabitants only are liable, and not those who only *occupy* in that parish, and live in another; *but the repairing of a church is a real charge upon the land, let the owner live where he will.*" This case is cited by the censualists for the last sentence, which, contrary to all the authorities, (*d*) asserts that church rates are a real charge. In a report of the same case in 1 Salk. 164, (*e*) the prohibition is stated to have been *denied,*

(*a*) 2 Lutwyche's Rep. 1019. (*b*) Page 53, 255, ed. 1679; *ante*, 20, 21, 23.
(*c*) 3 Modern Reports, 211. (*d*) Lyndwood ubi suprà, *ante*, 20, 21.
(*e*) By the name of Woodward *v.* Makepeace.

and the *obiter dictum* as to the repairing of the church being a real charge upon the land is omitted. A report of the same case in Comberbach, 132, (*a*) agrees with that in Salkeld in both these respects.

Ball v. Cross (*b*) has been cited by the censualists for a dictum of Holt, C. J., "that by the common law parishioners are bound to repair the church, but by the canon law the parson is obliged to do it; and so it is in foreign countries." 1689. I have already shewn, that the circumstance of this liability being, in a certain sense, a *common law* liability, is no proof of its untraceable antiquity.

They also rely upon Comberbach, 344, where a prohibition was granted to stay a suit in the Ecclesiastical Court, the libel setting forth that a rate was made for a repair of a church and chancel in Exeter; the rate being entire, and the parish not ratable for the repair of the church. The case goes on to state, that Holt was of opinion, that "if there be public notice given to the parishioners, and they will not come, the churchwardens may make a rate without them." 1695. The name of the case is not given in Comberbach, but in 1 Salk. 165, it is reported by the name of Pierce v. Prouse; and in 1 Ld. Raym. 59, oy the name of Pense v. Prouse; in Carthew, 360, by the name of Hawkins v. Rous; in Cases tempore Holt, 13, by the name of Hawkins v. Rouse; and in 5 Modern Reports, 390, by the name of Hawkins' case. In none of these contemporaneous, though somewhat dissonant reports, does this *obiter dictum* appear; and, considering the character of Comberbach as a reporter, (*c*)

(*a*) By the name of Woodward *v.* Mackpeth.

(*b*) 1 Salkeld's Reports, 164; Holt's Reports, 138.

(*c*) In the House of Lords, 26th May, 1783. Bishop of London *v.* Fytche.—Buller, J., in delivering his opinion, in answer to the questions proposed to the judges, taking notice of a case which had been cited from Comberbach, and of one cited from Noy, by the counsel at the bar, observed, that they were books of *no authority*, and, if his memory did not greatly fail him, had been *forbidden* by some of their predecessors to be cited at the bar. Cunningham's Law of Simony, 77. In the debate of the same case, 30th May, 1783, Lord Thurlow said, Carthew and Comberbach were equally bad authority. In 4 East, 540, Lord Ellenborough says, "The comparative accuracy of Comberbach as a reporter, may be judged of by referring to his short report of this case (Smallcomb *v.* Cross), under the name of Smallcorn *v.* Vic. Lond., Comb. 429, in which report the facts, the point, and names of parties are all mistaken."

I think it is not entitled to any consideration; though it is true that taken literally the position cannot be controverted without supposing a case in which the churchwardens were not themselves parishioners. The report in Salkeld is this,—Churchwardens assessed a rate for repairs of the church, and after libelled against a parishioner for not paying it. Et per Cur. being moved for a prohibition. 1st. The parishioners ought to assess the rate, and not the churchwardens. 2dly. The parishioners are only bound to repair the church and not the chancel, for that it is to be repaired by the parson.

In Dawson v. Wilkinson (*a*) the Court of King's
1737. Bench prohibited the Ecclesiastical Court from enforcing a rate made to reimburse churchwardens, and the Court said "the reason is, that they are not obliged to lay any money out of their pockets." This reason would be unsatisfactory if the churchwardens were compellable by ecclesiastical censures to do repairs whether the parishioners consented to a rate or not. And, therefore, the principle is denied by Dr. Nicholl, though he has not noticed this case.

1810. The same point was decided in Rex *v.* Haworth, (*b*)
1820. and in Lanchester *v.* Thompson, (*c*) and recognized
1834. incidentally in Northwaite *v.* Bennett. (*d*)

In Rex *v.* Churchwardens of St. Peter's, Thetford, (*e*)
1793. the King's Bench in the most distinct terms disclaimed any authority to issue a mandamus commanding the churchwardens to make a church rate, although the inhabitants had refused; saying, "We cannot interpose by granting a mandamus, this being a subject purely of ecclesiastical jurisdiction." This case appears to decide the whole question.

So, in Rex *v.* Archbishop of Canterbury, (*f*) upon an
1807. application for a mandamus to admit an advocate in the Court of Arches, the Court said that they had no authority to administer a *legal* remedy except to enforce a *legal* right.

In Rex *v.* Coleridge and others, (*g*) (which was a
1819. rule for a mandamus to the rector, curate, churchwardens, and sexton of St. Andrew, Holborn, com-

(*a*) Cases tempore Lord Hardwicke, 381. More fully reported, Andrews, 11;
(*b*) 12 East, 556. (*c*) 5 Maddock, 4. (*d*) 2 Cromp. & Mees. 316; 4 Tyr. 236.
(*e*) 5 Term Rep. 364. (*f*) 8 East, 213.
(*g*) 2 Barn. & Alder. 808; more fully reported, 1 Chitty Rep. 583.

manding them to bury M. G.) Abbott, C. J. said, "the question is, whether this Court can interpose in this particular case, by granting a mandamus, and I am of opinion that it cannot. It may be admitted, for the purpose of the present question, that sepulture in a parish churchyard is a common law right;(*a*) but I think that the *mode* of burial is a subject of ecclesiastical cognizance, and ecclesiastical cognizance only. If a clergyman should obstinately refuse to bury the body of a parishioner brought to him for interment, *I am by no means prepared to say that this Court would not grant a mandamus*, commanding him to perform the obsequies of the dead.(*b*) But in the cases cited, in which the court has interfered by mandamus, the Court was only acting in furtherance and in aid of the ecclesiastical jurisdiction. In some of the cases cited, application was made to this Court to obtain the objects in view with more celerity than they could be obtained by the process of the ecclesiastical jurisdiction, the proceedings of which were more slow in their nature than the proceedings of this Court by the writ of mandamus, to compel the performance of that which was required to be done. This Court would

(*a*) The position that a parishioner may have a *common law* right to interment in the church-yard is put by Lord Tenterden only hypothetically. The right to interment generally, or rather the right of survivors to require that the body of a deceased person shall be in some way removed from places frequented by the living, is a natural right resulting from the natural consequences of the decomposition of animal matter, and is therefore part of the common law. But the right to interment in a particular spot set apart for the reception of the bodies of persons dying under certain conditions which are of ecclesiastical cognizance, can scarcely be said to be a common law right. *Vide post*, 45.

(*b*) In this sentence, Dr. Nicholl (p. 25) discovers a clear indication, that if the Ecclesiastical Court be without sufficient means of acting in matters within its cognizance, the King's Bench will grant a mandamus. If so, why should not a mandamus issue to executors to pay a legacy? Because the Court will not *bind* themselves not to interfere where what may turn out to be a common law right is connected with forms which are of ecclesiastical cognizance, if public health and public decency require that interference, it is inferred that they will interfere in cases where there is no common law right and where no such circumstances occur. This seems to be pretty much the same sort of reasoning, as if from a declaration by Lord Tenterden, that he was not prepared to say that he should not take a journey, it should be inferred that he was certainly going to York. Though he appears for the moment to acquiesce in that part of Lord Tenterden's judgment which so distinctly disclaims the power of issuing a mandamus to compel the making of a church rate, yet, like a man convinced against his will, Dr. Nicholl reproduces his opinion in favour of the mandamus in every other part of his work where the question arises.

interpose to order that to be done which might lawfully be done. But it would not require parties to do that which would be indecorous in its nature, or might become the subject of indictment as a public nuisance. In the case before the Court, the object is not to inter the body of the deceased in the usual and ordinary mode of burial, but the contest between the parties is, whether the officers of the parish shall bury the body in an unusual and extraordinary manner. Without pronouncing what the Ecclesiastical Court may do, I am of opinion that that is a question proper for the decision of the Ecclesiastical Court, and not of this Court. I need not observe that, in matters purely of ecclesiastical cognizance, this Court does not interfere. In the common and familiar instances of the repairs of a parish (church), it is well known that *this Court will not interfere by mandamus to compel the repairs of the parish church.*"

1797. Rex *v.* Select Vestry of Preston, (*a*) supposed to be "directly in point," (*b*) was the case of a mandamus to a *select vestry*,—to enforce the making of a rate according to a *local custom*, either of which circumstances would have rendered it inapplicable to the question.

1825. In Rex v. Wilson, (*c*) a rule had been obtained calling upon the churchwardens to show cause why a mandamus should not issue requiring them to make a rate. It was objected, that all that churchwardens could be required to do was to call a meeting of the parishioners for the purpose of considering the propriety of making a rate, and that the churchwardens had not power to make a rate without the sanction of a vestry. The force of the objection is stated to have been admitted by the counsel who had obtained the rule, and the judgment of the Court is given in these words:— "You cannot call upon the churchwardens to make a rate; you can only call upon them to hold a vestry meeting for that purpose." It has been said (*d*) that the ground of the refusal must be taken to have been that the churchwardens could not be called upon to make a rate without first holding a vestry meeting for

(*a*) Fully stated and observed upon by Mr. Arnold in his "Law upon Church Rates," page 44.

(*b*) 17 Law Magazine, 384.

(*c*) 5 Dowling & Ryland's Reports, 602.

(*d*) Deacon's Letter to Lord Stanley, 10.

that purpose. If that was the meaning of the Court, they appear to have adopted a most unhappy mode of expressing it.

In Rex *v.* Justices of Monmouthshire(*a*) the Sessions, being equally divided in opinion on an appeal against an order of removal, quashed the order. It was held that, even supposing that the sessions ought to have adjourned the appeal, and that their judgment to quash the order was erroneous, no mandamus lay to rehear the appeal; and that although they might be compelled by mandamus to hear and decide an appeal, yet, having determined the appeal, they could not be compelled to correct their judgment, supposing it to be erroneous. This case has been put forward (*a*) as an authority for the position, that the Court of King's Bench will not only compel parishioners by mandamus, to meet for the purpose of considering the propriety of imposing a church-rate, but will treat a refusal to make a rate, in a case where repairs are necessary, as a refusal to decide. On the contrary, the refusal to make a rate appears to be analogous to the quashing of an order of removal upon an insufficient ground disclosed to the Court, in which case the Court of K. B. say they will *not* interfere with the jurisdiction of the sessions. 1825.

Rex *v.* Inhabitants of Wix(*b*) was a mandamus to meet and elect churchwardens; and as churchwardens are temporal as well as spiritual officers, there could be no doubt either as to the duty of the parishioners to elect, or as to the authority of the Court of Common Law to require the parishioners to assemble for that purpose. The difficulty was to know to whom the writ should be directed in a case where a legal liability to do an act of a temporal nature was admitted. Precedents were at last found for a mandamus to parishioners, which are thus noticed by the reporters in a note:—"In M. 10 Geo. 2, a mandamus was granted to "the churchwardens and overseers of the poor of the parish "of St. James, Clerkenwell, and to the principal inhabit-"ants thereof, to assemble together in the parish church, "and to make rates and collect the moneys for repair-"ing the church, &c. And in E. 1 Geo. 3, a mandamus was "granted to the vicar, churchwardens, and parishioners of "Croydon, to hold a vestry, and nominate ten persons, out of 1831.

(*a*) 4 Barnewall & Cress. Rep. 844; 7 Dowl. & Ryl. 344.

(*b*) 2 Barnewall & Adolph. Rep. 157.

" whom trustees were to choose collectors of a rate for the re-
" pair of the church."

1736 The former of the two cases(*a*) mentioned in the above note was a mandamus to the churchwardens, *overseers of the poor*, and *twenty* inhabitants of the parish of St. James, Clerkenwell, and to the churchwardens, *and overseers of the poor and vestrymen*, of St. John's, Clerkenwell, under three acts of parliament.

1761. The second of these cases (the Croydon case) was also under a special act of parliament.

1831. In Cockburn *v.* Harvey,(*b*) Lord Tenterden, in delivering the written judgment of the Court, says,

" Rates for the repairs of churches in parishes, by the common law, are to be made *by the churchwardens and the vestry*, that is, *by the churchwardens and inhabitants in vestry assembled*, if there be not a select vestry established by usage or act of parliament."

1832. So in Rex *v.* Churchwardens of St. Mary, Lambeth,(*c*) a mandamus was granted, because, being under a statute *the matter was not of ecclesiastical cognizance.*

1832. In Greenwood and Spedding, appellants, *v.* Greaves, Clay and others, respondents,(*d*) the right of the Ecclesiastical Court to compel the making of a rate,

(*a*) See both these cases very fully stated from the original MS. in Arnold's " Law upon Church Rates," 37.

(*b*) 2 Barn. & Adol. 797. (*c*) 3 B. & Ad. 651.

(*d*) 4 Haggard's Ecclesiastical Reports, 77. The appellants, who were two of the churchwardens of the parish of Dewsbury, had cited Greaves and Clay (the other churchwardens) and other parishioners " to answer to certain articles touching the health of their souls, and the lawful correction and reformation of their manners, and particularly for their refusing to make or concur in making a rate or assessment, or sufficient rate or assessment for the necessary repairs of the parish church; and for the lawful and necessary expenses of the churchwardens relating to the parish church, and incident to their office." The first article stated a custom for rating each of the three townships to a third of the expenses of repairs, &c. The second article stated, that an estimate of repairs, amounting to £111 : 1s. was submitted at a vestry meeting, that such repairs were necessary; that the respondents refused to make or concur in making a rate to the amount necessary to defray the charges and expenses, but in lieu thereof agreed to make a rate amounting altogether for the three townships to £50 : 17s., which is wholly inadequate to pay for the necessary repairs of the parish church, &c., and that by reason thereof the necessary repairs cannot be done.

The Ecclesiastical Court of York having rejected these articles, the Court of Delegates affirmed the decree of rejection.

The printed report is silent as to the ground of this decision; but from the

though insisted upon in the argument, was not decided by the Court.

In Rex *v.* Churchwardens of Dursley(*c*) the Court entertained an application for a mandamus, command- 1836. ing churchwardens to make certain payments, or to raise by a rate a sum sufficient for that purpose, although they ultimately refused to issue the writ. But that was an application under the Church Building Act (10 Ann. c. 11), by which churchwardens are empowered and required to raise by rate a sum sufficient, from time to time, to pay the interest of money borrowed under authority of that act.

So in Rex *v.* Churchwardens and Overseers of St. Margaret and St. John, Westminster(*d*), the Court 1815. granted a mandamus to the churchwardens and overseers of the poor of two united parishes, requiring them to assemble a meeting, under the provisions of 10 Ann. ch. 11, for the purpose of agreeing upon and ascertaining the moneys and rates to be assessed within the limits of the two parishes for the repair of the parish church of St. John's.

With respect to Rex *v.* The Lords of the Treasury, ex parte Smyth, (*e*) relied upon by Mr. Deacon, (*f*) it is suf- 1835. cient to observe, that although the right sought there to be enforced was of civil, and not of ecclesiastical, cognizance, the decision was received with surprise by the profession; that applications nearly similar have been since refused ; and that in Rex *v.* Lords of the Treasury, ex parte Hand, (*g*) in which the Court was pressed with the decision in Ex parte Smyth, the Chief Justice in giving judgment expressed himself as follows: —" All that we said in that case was, that the Lords of the Treasury ought to make a return. We laid down no rule of law beyond that. They might have made a return, and a fuller consideration might then have been given to the subject."

It has been said, (*h*) that by one of the canons of 1603, " the

notes of the appellants' counsel it appears, that the Court was of opinion that the question, whether the Spiritual Court may compel parishioners to repair, was not raised by the pleadings.

(*c*) 6 Nev. & M. 3.

(*d*) 4 Maule & Selwyn, 250.

(*e*) 4 Adolphus & Ell. 286 ; 5 Nevile & Manning, 589.

(*f*) Another Letter to Lord Stanley, 5.

(*g*) 6 Nev. & M. 518.

(*h*) 17 Law Magazine, 379.

churchwardens or questmen shall take care and provide that the churches be well and sufficiently repaired," and that these canons, being framed in pursuance of 25 Hen. 8, have the force of law. The statute 25 Hen. 8, c. 19, contains no *enabling* clause, it merely directs "that the clergy from thenceforth shall not presume to attempt, allege, claim, or put in use any constitutions or ordinances, provincial or synodal, or any other canons, nor shall enact, promulge, or execute any such canons, constitutions, or ordinances, provincial, unless the same clergy may have the king's most royal assent and licence to make, promulge, and execute such canons, constitutions and ordinances, provincial or synodal, upon pain of every one of the said clergy doing contrary to this act, and being thereof convict, to suffer imprisonment, and make fine at the king's will." And it has been not only doubted, but denied, that these canons are binding upon the laity even in matters ecclesiastical. (*a*)

1837. On the 31st of January last a mandamus was granted to a corporation called "The wardens, overseers of the poor, and inhabitants of St. Saviour's, Southwark," to call a vestry and make a church rate for certain purposes under two local acts of parliament; (*d*) but it was assumed and admitted in the course of the argument, in the preceding Michaelmas Term, that at common law no mandamus could have been granted.

I have now gone through the cases which I have been able to meet with during the short interval which has elapsed since my attention was first drawn to the subject. As far as the investigation has as yet been carried, the view of the subject taken in the Attorney General's letter appears to be fully borne out; and the whole current of authority, with the exception of a few dicta, possessing neither weight nor authenticity, shows that a writ of mandamus cannot be awarded to compel an unwilling majority to make a church rate,—any more than they can be compelled to sow their lands on the ground that the rector depends for his support on the per-

(*a*) See Grove v. Elliott, 2 Ventris's Reports, 41; Hill v. Good, Vaughan's Reports, 302; Middleton v. Croft, 2 Strange's Reports, 1056; same case, Cases temp. Hardwicke, 57, 326, 395, and 4 Viner's Abridgement, 320, pl. 4, from MS.; Comyns's Digest, tit. Canons (C).

ception of tithes,(*a*) or in respect of the interest of the public in the cultivation of those lands, to which their means of subsistence are restricted by the corn-laws (*b*).

Whether it be considered as a positive liability binding the parish, or merely as a negative liability discharging others, the liability has attached by *custom*, and though a custom pervading the whole realm is a part of the common law, so as to dispense with the necessity of allegation or proof of the existence, or of the extent of such custom, yet it must be taken with such incidents, and no other, as have accompanied the exercise of the custom. The assistance provided by the common law towards the enforcing of the liability which, though thrown upon the parishioners by means which it may neither be desirable nor possible to investigate, is now ad-

(*a*) The owner of an entire parish could not be prevented by mandamus, or by any other legal course, from suffering his land to lie untilled, even though the effect should be to reduce the tithe-owner, whether ecclesiastical or lay, to that state which the Governor of Barataria characterizes, with a truth of description inspired by his own personal apprehensions, as,— " muerte adminicula y pesima, como es la de la hambre." By a happy coincidence between the phraseology of the Ecclesiastical Courts and that which Cervantes puts into the mouth of the simple squire of La Mancha, the expression is capable of an almost literal translation. Even learned canonists, adopting the sense in which one of their own forensic terms is used by Sancho, might speak of "*adminicular* death by starvation."

(*b*) Though in the North the people are assembling in large masses to " fright the land from its propriety" in hatred of a law directly tending to raise those who are most dear to them from the state of lazzaroni to that of citizens, not a murmur is heard when landholders, acting in their legislative capacity, secure to themselves, in their individual capacity, the right of selling one loaf at the price of two. Children go pale and hungry to bed, whilst the rich harvests which God has sent to renew their health and to invigorate their frames rot upon the fields of Poland and the Ukraine, in order that the price at which corn can be forced upon a barren heath, may be obtained from those who are able to pay it. Whether a commercial or an agricultural restriction is to be established, it is, in the present state of national education—or rather in the absence of national education—almost hopeless to advocate the rights of the many against the minor but concentrated interests (real or imaginary) of the few. If editors of leading journals,—instead of dwelling upon outrages committed by an *un-English* police against the liberties of *English* pick-pockets, or supporting men interrupted in their course of getting rich, like Manuel Ordoñez, by administering the goods of the poor, (n'ayant en vue que le BIEN des pauvres,) had been pleased to adopt the cry of " Nothing like leather," crowds of distressed curriers would have required the walls of the Tower to be forthwith thrown down and reconstructed upon sound conservative *coriaceous* principles ; and ball after ball would have been announced at the Mansion House, to afford to the "patrons of British industry" an opportunity of dancing or attempting to dance in a costume of appropriate buckskin.

mitted to exist, appears to amount to this:—The common law permits the Ecclesiastical Courts to apply the coercive authority of their laws to the extent which their own rules warrant, provided no direct charge is sought to be imposed upon property, and provided they abstain from determining questions, the cognizance of which belong exclusively to the King's Common Law Courts; which modes of coercion in the Ecclesiastical Courts seem to be by ecclesiastical censures terminating in excommunication, or adjudication of contumacy, to be inforced by process of imprisonment issuing out of the Common Law Courts in pursuance of a significavit, in cases when a liability to do a specific act is attached upon individuals either in their personal or in an official capacity;(*a*) and secondly, by interdict or suspension of the celebration (*b*) of divine service when the default has not assumed an individual personal character. And the Common Law further permits the exercise in favour of Church Rates of that species of domestic administration, by which the major part of parishioners may not only bind the minority as to all matters of a public nature, as the re-

(*a*) Ecclesiastical censures can with propriety only be addressed to those who are members of the censuring church; and the whole system of ecclesiastical jurisdiction over those who are not such members, rests upon the old legal fiction (perfectly reasonable at a period when the law took notice of dissent only as a *crime*) that the subjects of a prince are members of the prince's church, and that all who obey a parliamentary king necessarily worship a parliamentary God.

(*b*) 1244. By a record of the reign of Henry III. it would appear that posthumous or rather *antehumous* corporal punishment was sometimes inflicted under the authority of the ecclesiastical judge.

Pleas in the county of Dorset before R. de Thurkeleby and his fellows in the 28th year of the reign of King Henry, son of King John.

Master Walter, Archdeacon of Taunton, and Master Henry, his official, were attached to answer William de Oreways of a plea wherefore they held plea in the Court-Christian of the lay fee of the said William in Badyanton, against, &c. And thereupon he says, that he delivered to them the prohibition of the Lord the King, &c. at Taunton, in the Church of St. Mary Magdalen; yet, the said Archdeacon and Master, contemning the prohibition aforesaid, caused to assemble the whole parish of Badyanton, and by a certain inquisition which they then made by certain of the parishioners, made a certain perambulation in the court of the said William through the middle of his capital messuage, and demanded a certain part of the said messuage, &c. and caused him to be denounced as excommunicated, and all communicating with him, and also his men (tenants), so that by reason of that denunciation he could not have any servant, *and caused one of his men (tenants) who was dead to be cudgelled before his body could be buried*—"et quemdam ex hominibus suis mortuum, priusquam corpus ejus posset sepeliri, fecit fustigare, &c.;"

pairing of churches, highways, parochial brìdges, &c. but may inforce their regulations by process of distress. (*c*)

In consequence of the inefficacy of the remedy by interdict, and the inapplicability or uncertainty of the proceeding by personal ecclesiastical censures, the repairs of churches are, in the present state of the law, dependent upon the caprice of the parishioners; as it would be inconvenient, if not positively unjust, to insist on the right to resort to the receivers of the tithes, who, according to the ecclesiastical writers, are still liable to the repairs of the body of the church, when the

and the archdeacon and Master Henry came and defended the force, &c., denied the holding plea against the prohibition, but said nothing as to the fustigation. They were dismissed upon waging their law, &c. duodecimâ manu, (that is, by swearing that they had not held plea since the prohibition, and by producing eleven persons to swear that they believed them,) and the plaintiff was,—in misericordiâ, taken into custody, and fined one mark. Placitorum Abbreviatio, 121.

This is what honest Sancho would call " Yr por lana, y bolver trasquilado."

It may be doubted whether, in these days, the fustigation of all the corpses in the parish would turn the hearts of a radical vestry.

(*c*) See Smethesden *v.* Ashton, 1 Roll. Abr. 666, translated 9 Vin. Abr. 136, pl. 1; Brumfield *v.* Tea, Freeman's Rep. 103; 1 Anderson's Rep. 71.

1225. The English division of nave and chancel appears to have been adopted in Scotland by the clergy in the thirteenth century. The following decree was made at a national council held in the reign of Alexander II.:—" Statuimus quod ecclesiæ ad modum facultatum ipsorum parochianorum et per ipsos parochianos, et cancella earum per ipsos rectores, de lapidibus construantur, &c. et ad statum debitum reformentur." 1 Wilk. Conc. 608.

1558. In the struggle to prevent the introduction of the Reformation into Scotland, a synod was held, in which it was declared that churches were to be repaired by the rector and the parishioners, the former obligation to be enforced by sequestration; and an inquisition was to be made for persons who broke images or neglected to repair the body of the church, and who were to be brought before the ordinary, and punished according to the canon law. (Concil. Provinc. Cleri Scoticani, ed. 1558, 4 Wilk. Conc. 211.)

1563. After the Reformation, it was enacted, (Parl. 1563, cap. 76,) that the manner of repairing kirks should be remitted to the Council; the Council laid the burden of repairing two-thirds of the church upon the parishioners, and one-third upon the parson. In ratifying the Act of Council (Parl. 1572, cap. 54) the manner of repairing kirks is not repeated in the ratification, but it is only said in general, that the parishioners were warranted to name persons to stint their neighbours. (Stair's Institutions, Book 2, tit. 3, s. 5.) This arrangement would rather appear to have been made in imitation of that which existed in England, without perhaps adverting to the different position of the religious establishments of the two kingdoms in respect of the tithes, upon which in both countries the burthen originally rested. The resemblance between the two systems would have been closer if the Scottish clergy had retained, or the English had lost their tithes.

means derived from other sources are inadequate.(*a*) This is a state of the law which ought not to continue—which cannot continue.

The circumstance, that an alteration in the state of society has rendered former remedies less efficacious, does not appear to me to authorize the admirers of church rates to call for more stringent measures either by the ordinary course of law, or by the extraordinary interference of the legislature.(*b*) Those against whom the new remedies would be applied, might say with justice, "although the persons to whose interests we have succeeded and whom we represent, were in their unguarded moments prevailed upon to relieve the rector from the liability to repair the church, they did not consent that their condition and ours should be rendered still less tolerable by variations in the terms of the new engagement." It would be peculiarly oppressive to aggravate the burthen at a period when a large portion of the community cannot, without doing violence to their convictions, derive any benefit from the services rendered,—whether such services are considered as rendered in respect of the tithes exacted under the original contract, or in respect of the additional payments in the form of church-rates to which the parties may have become contributory under the substituted arrangement.

I cannot entirely pass over some cases, which though they have no direct bearing upon the point of law, appear to me not without interest with reference to the general question.

1617 In a case between the inhabitants of the parish of Stratford and the inhabitants of the chapel (qu.? chapelry) of ease of Loddington, it was held, that if there be a parish church and a chapel of ease in the same parish, and the chapel of ease has, time immemorial, had all spiritual rites, except burial, which has used to be done in the parish church, and they who have used to go to the

(*a*) Peckius, 47; Lyndwood, Prov. 251. But the original third of the tithes appropriated to the clergy appears to be in no case liable to be burthened for the repairs of the church. "De tertiâ parte decimarum nihil presbytero qui servit ecclesiæ, auferatur.—Concil. Normann. apud Abrincam Civitatem (Avranches) temp. Henrici II. 1179. 4 Wilk. Concil. 790; 2 Spelm. Conc. 99, &c.

(*b*) Quod malè *persuades*, utinam benè *cogere* possis,—was not written for the consolation of a churchwarden, disappointed in obtaining a vote of credit from the guardians of the parochial purse.

chapel of ease have immemorially used to repair a part of the wall of the churchyard, and in consideration thereof, and because those who are of the chapel of ease have immemorially used to repair the chapel of ease at their own costs, they have been time out of mind discharged from the repair of the parish church, the prescription is good (*a*).

And in Penneland *v.* Toye (*a*), a prescription to have all sacraments, except burials, in a chapel of ease, 1635
and to repair the chapel, and to pay 3*s.* 4*d.* per annum for reparation of the mother Church, in discharge of their reparation of the mother Church, was held to be good.

In Weeks *v.* Oxendon, in C. P. (*b*), Weeks being sued in the Ecclesiastical Court for repairs of the 1681
Church, suggested, that he had built an aisle and repaired it at his own charges, and moved for a prohibition. *Sed per Curiam.*—Unless it be suggested, that he sits in the aisle, *and hath no benefit of the navis Ecclesiæ*, there is no cause for a prohibition.

It appears from the three preceding cases that the spiritual consolation and temporal advantages which the parishioners derived from the Church, were considered as the consideration of the repairing of the Church, and that those benefits formed the standard and measure of the extent of the liability. (*c*) There seems, therefore, to be some ground for contending that such liability (*d*) ought to be considered as at an end from the

(*a*) 2 Roll. Abr. 290, translated 17 Vin. Abr. 579, pl. 1. And the same point is stated to have been determined in Marshall *v.* Ashley, in 1602.

(*a*) 2 Roll. Abr. 290, translated 17 Vin. Abr. 579, pl. 2.

(*b*) Freeman's Reports, 301.

(*c*) Johannes Andreas however, (called by Baldus, *Juris Canonici* Fons et Tuba) who contrary to the present usages of the profession, bivouacked for 20 years in a bear's skin, (viginti annos, pelle ursinâ tectus, citra lecti delicias noctu cubuit,) did not think that a parishioner could avoid payment by absenting himself from the parish church (quod possit excusari aliquis, licet velit renunciare usui ipsius ecclesiæ.) Lyndwood, 255, edition of 1679. So Peck. insists "omnes teneri, etiamsi commodo ecclesiæ renunciare velint," for, says he, "vicinus non eximitur ab onere reficiendi *putei* communis, si usui ejusdem renunciare velit." Peckius de Ecclesiis reparandis, ed. 1620, p. 64. *Vide ib.* 37, 39, 47, 49, 63, 81.

(*d*) Perhaps "liability to repair a parish church" ought, with reference to the mode in which it devolved upon the parishioners, to be understood in the sense in which the owner of a house is said to be *liable* to repair, when he has ceased to have a tenant who is under covenant to repair. This view of the case is not inconsistent with the control exercised by the Ecclesiastial Court pro salute animarum.

moment when it ceased to be a legal crime to be incapacitated from the reception of the spiritual consolation, and from the participation in the temporal advantage.

I have the honour to be,
Your Lordship's most obedient humble servant,
JAMES MANNING.

Upon the supposition of the duty of spiritual obedience to the spiritual court, the spiritual judge would be entitled to interfere for spiritual purposes with the arrangements of a private house. If in a private oratory St. Sebastian were exhibited with a gridiron, and St. Lawrence as pierced with arrows; St. Catherine at the pianoforte, and St. Cecilia with the wheel—such a scandalous misrepresentation might be a proper subject for ecclesiastical censures—dignus vindice nodus.

The difficulty consists, first, in the assumption of the duty of obedience to ecclesiastical jurisdiction exercised by the spiritual officers of one religious community over those who are not members of that community; and secondly, in the perversion of the process of excommunication to indirect and collateral purposes: even where the jurisdiction properly exists, "Excommunication ought to be reserved for repressing the atrocity of *horrible crimes*, bringing most grievous *infamy* upon the Church as tending to the entire overthrow of religion, or to the perversion of morals." 2 Gibson's Codex, 1095. But no infamy is incurred by the crimes of *strangers*. Neither the fierce persecutions nor the revolting immoralities of Nero, though practised at Rome, were ever supposed to subject him to the correctional jurisdiction of the bishop of that city, or to furnish grounds for a sentence "cutting him off from the unity of the Church." There can be no exsection of that which is not parcel,—no cutting off of that which never adhered. It is an abuse of the process of excommunication to apply it to those who are incapable of communicating,—an abuse as startling as the bold antithesis of Quevedo, who in his letter of remonstrance to Lewis XIII., complaining of a sacrilege committed by French hugonot soldiers in plundering a nunnery in Flanders, and throwing the consecrated wafer into a manger, exclaims, "Cavallos comulgados, y descomulgados cavalleros!" (Horses made communicants and excommunicated horsemen.)

"Let us take any men's horses, the laws of England are at my commandment" would sound strange in the mouth of a churchman, even whilst proceeding towards Kensington to do homage for the temporal barony annexed to his see, the original grant of which is probably inscribed upon the *lunar tables* that record the donation of Constantine to Pope Sylvester, and are safely deposited near the spot where Astolfo obtained possession of the the phial labelled "Senno d'Orlando," in which were stored the wits of that paladine after they had escaped from their proper earthly receptacle upon the discovery of the disloyalty of Angelica.

"Di varj fiori ad un gran monte passa
Ch'ebbe già buono odore, *or putia forte*.
Questo era il dono (se però dir lece)
Che Constantino al buon Silvestro fece."

Orlando Furioso, canto xxxiv. 80.

Vide 2 Wilk. Conc. 9, 417, 48, 138, 141, 278; 3 Wilk. C. 11, 175, 276; 4 Wilk. C. 395, 805; Concil. Trident. Sess. 21, cap. 7; 1 Wilson's Reports, 283.

POSTSCRIPT.

By the 33d article of the Church of England "That person which by open denunciation of the church is rightly cut off from the unity of the church and excommunicated, ought to be taken by the whole multitude of the faithful as a heathen and a publican, until he be openly reconciled by penance and received into the church by a judge that hath authority thereunto." So Lord Coke says—"Excommunicatio est nihil aliud quam censura a canone vel judice ecclesiastico prolata et inflicta, privans legitimâ communione sacramentorum, et, quandoque, hominum;" Co. Litt. 133 b. And Lord Chief Baron Comyns says—"Excommunication is when a man by sentence of the Ordinary is deprived of communion with the church of God;" Com. Dig. *title* Excommengement (A 1.) Again Lord Coke says—"The spiritual judge's proceedings are for the correction of the spiritual inner man, and pro salute animæ, to enjoin penance;" 2 Inst. 622. All this is as it should be. If we had no higher authority on the subject it would be reasonable that a society should exercise the power of rejecting such members as refused to conform to its regulations. But upon the alliance being formed between the church and the civil power the members of the church were considered as the *subjects* (*a*) of their spiritual superiors, and contumacy was treated as *rebellion* (*b*); and as the church had no machinery of its own with which to punish rebellious subjects the secular arm of the civil magistrate was called upon to lend its assistance. In England this assistance was afforded by the writs de excommunicato capiendo (*c*), and de hæretico comburen-

(*a*) See Lyndwood, Provinciale, 315, 316, *et passim*.

(*b*) Persons refusing to contribute to the repairs of a belfry are designated as *rebels* in a monition by the Bishop of Lincoln to the Dean of Hoyland against the parishioners of Malton, A.D. 1282, given as the common form of a monition in 2 Oughton, 292; and see ibid. 393, commission to archdeacon to compel parishioners to repair the belfry of Hythe church by canonical coercion; ibid. monitio pro ratâ, by which the Dean of the Arches enjoins the rector of N. to admonish and induce by all lawful means (modis omnibus quibus de jure poteritis) the possessors of estates (prædiorum) and rents in the parish, although non-resident (quamvis alibi larem foveant) to assist the resident parishioners in the repairing of the belfry, on the ground of the inability of the latter.

(*c*) Upon the certificate or significavit from the bishop that the party excommunicated has *contemned the keys* (i.e. the keys of heaven) for forty days, that period being allowed for an appeal to the court of Rome (Prior of Leeds's case, P. 20,

do (*d*) upon a significavit or certificate from the bishop. The clergy having thus obtained a temporal weapon for the purpose of enforcing spiritual regulations, the next step was to use the spiritual regulation as a means of bringing the temporal weapon within their grasp. Excommunication therefore is now denounced against persons refusing to pay church-rates,—not truly and sincerely for the correction of their manners and the salvation of their souls, but for the purpose of making stepping stones of these *minor* objects to the process of imprisonment which lies beyond them. This is one of the abuses pointed out above (page 16). It probably originated in the sale of Indulgences. In both cases ecclesiastical censures are commuted for gold. This difference is however observable, that in

H. 6, fo. 25, pl. 20), the writ de excommunicato capiendo issues without any notice to the party, who is thus liable to be imprisoned, and is disabled from suing even where the excommunication is wrongful, and he is left to his remedy by action or indictment (*post*, 45) against the bishop or his official. These hardships have for a long time been strongly felt, and as early as the reign of Edward III. were made the subject of a petition from the Commons, which did not, however, receive a very gracious answer from the throne.

Petition—"Also pray the said Commons, that a writ ad capiendum excommunicatum may not be granted by signification of the bishop before a scire facias be sued against the party, that he may have his answer if the cause be of lay-fee, or of lay-contract, or of spiritualty."

Answer—"Inasmuch as this petition is as well against the law of the land as of holy Church, it appears to the Council that it ought not to be granted."—2 Rot. Parl. 230.

Petition—"Also, when letters of excommunication are put forward against a party to incapacitate him from being answered, that the party have his answer whether the cause be of lay-contract or of spiritualty."

Answer—"Inasmuch as this petition is not reasonable, it appears to the King and to his Council that it ought not to be granted." *Ibid.*

Where, however, the significavit is defective upon the face of it, and the party has the good fortune to obtain timely notice of the proceeding, he may apply to the temporal court to quash it.

Thus in the case of Rex *v.* Eyre, 2 Strange's Reports, 1067, Lord Talbot, Chancellor, quashed two significavits which described no ground for the excommunication, otherwise than by saying that they were in a cause which came by appeal concerning a matter merely spiritual, "for we are to lend our assistance but where it appears clearly they have *jurisdiction, and are not to trust them to determine what is a matter merely spiritual.* It is no more than saying that it is within their jurisdiction, which is never endured."

(*d*) The writ de hæretico comburendo was taken away by 29 Car. II. c. 9. This "first instalment" towards the mitigation of the ecclesiastical code has not been followed by any further changes. Since the Reformation, i. e. for more than a hundred years before the abolition of this process, it had rarely issued except against the minor sects. Even the rash advisers of Charles I. did not venture upon the experiment of burning a puritan.

the case of Indulgences the ecclesiastical censures are pronounced bonâ fide, and the commutation is a distinct matter arising afterwards, whereas in the case of the writ de excommunicato capiendo, spiritual and eternal interests are from the very beginning mere machinery, got up with a view to the ultimate *pecuniary* object.

The other abuse (*ante*, 16) without involving less profanation, exhibits still greater absurdity. To cut off from the unity of the church one that was never a member of that church (more especially if being a Jew or other unbaptized person, he has not the proxima potentia of becoming a member,) seems to be as strange a proceeding as if in the exercise of a different branch of ecclesiastical jurisdiction the sins of a bachelor were visited with a sentence of *divorce*. For this abuse, however, the law has provided a remedy, if there be no substantial difference between the undue assumption of jurisdiction over persons and over things. A bishop who excommunicates for a matter not within his jurisdiction is liable to an action on the case for damages at the suit of the party aggrieved, and is punishable criminally by fine and imprisonment, upon an indictment for the misdemeanour; 2 Inst. 623. But as primâ facie every person is the spiritual *subject* (*ante*, 43) of the bishop of the diocese within which he resides, no wrong would be done or misdemeanor committed by excommunicating a dissenter or a Jew, *for contemning the keys* (i. e. the keys of heaven), unless the bishop or his official had *notice* that the supposed rebel was a party whom the law exempted from the obligation of believing that such keys are entrusted to the keeping of either the one or the other of those functionaries.

Notwithstanding the doubt raised in Rex *v.* Coleridge (*ante*, ~~23~~ 30), I think no mandamus can be granted to a rector to bury a dead body. Upon a motion to quash, as insufficient, a return to such writ, stating that the party was unbaptized, excommunicated, or an apostate, or a usurer, (*e*) the court having, as we have seen (*f*) no judicial knowledge upon these matters, would be incapable of deciding whether a peremptory mandamus ought to be awarded or not; or if an action were brought for a false return, neither the court nor a jury would be competent to pronounce upon the regularity of baptism or excommunication, or to say what degree of renega-

(*e*) By the ecclesiastical law, the receipt of *interest*, however moderate, constitutes usury. I am not aware of any attempt, by mandamus or otherwise, to expel the body of a deceased mortgagee *latitant* in consecrated ground.

(*f*) Ante 18, where the judicial ignorance of the Courts of common law in matters of ecclesiastical cognizance is represented as being so profound, as to incapacitate them from forming an opinion whether a son may, like Œdipus, become τῦ πατρός ὁμοσπόρος by marrying his own mother.

tion amounted to apostacy, or whether a party belonged to that class of usurers, against the mouldering remains of whom the ecclesiastical law has closed the gates of the churchyard.

——— *αὐτοὺς δὲ ἑλώρια τεῦχε κύνεσσί,*
Οἰωνοῖσι τε πᾶσι———.

The same difficulty would attend a mandamus requiring parishioners to *make* a church-rate. If the parishioners were to return, that the objects for which the church-rate had been proposed are partly books and vestments, and that the church is provided with such and such books and such and such vestments, *which are sufficient*, the court would be equally at a loss to determine upon the sufficiency of the books and vestments, and would therefore be unable to decide whether or not a peremptory mandamus ought to go.

It may be doubted whether those, who now insist upon the interference of the secular arm, in the shape of writs of mandamus and excommunicato capiendo, and new penal enactments, in matters which they admit to be purely ecclesiastical, assume a position which is perfectly safe, and whether there may not lurk some danger of obtaining more interposition than may be considered altogether beneficial. Lucy Hutchinson said to her over-zealous puritan friends— "Wee have spirituall weapons given us for spirituall combats; and those who goe about to conquer subjectes for Christ with arms of steele, shal find the base metall break to shivers when it is used, and hurtfully flie in their owne faces."

In England it is considered part of the duty of the civil power to provide buildings for religious instruction, and funds for the support of those by whose ministry that instruction is imparted; and it is also considered part of the same duty to point out the particular description of religious instruction which the people are to receive; in America *neither* branch of this duty is is recognized; the former country adopting the *voluntary principle* in labour, and the latter in religion. It may be thought highly desirable that the duty should be performed in both its branches, more especially where the civil magistrate is a member of an infallible church. But however this may be: the two objects appear to be, in their own nature, as distinct as building a hospital and swearing the physicians and surgeons to a prescribed and invariable course of practice. Those who admit the expediency of building and endowing the hospital are not usually considered to be precluded from disputing the necessity of laying down minute regulations for the medical treatment of the patients. This distinction appears to have been wholly overlooked.

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